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No. 05-381

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE COCA-COLA COMPANY, CATERPILLAR INC., APPLE COMPUTER INC., AND THE BLACK & DECKER CORPORATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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BRIEF OF *AMICI CURIAE* SUPPORTING PETITIONER

STATEMENT OF INTEREST

Amicus The Coca-Cola Company ("Coca-Cola") is a worldwide manufacturer and distributor of soft drinks and other products. The Company is widely known, with operations and products spanning the globe. Coca-Cola depends upon the ability to purchase competitively to succeed.

Amicus Caterpillar Inc. is a technology leader and the world's leading manufacturer of construction and mining equipment, diesel, and natural gas engines and industrial gas turbines. Caterpillar products and components are manufactured in 49 facilities located in the United States and, as a result, Caterpillar also needs the freedom to purchase competitively to maintain its success.

Amicus Apple Computer Inc. ("Apple") is a leader in the personal computer and consumer electronics industry. Today, Apple produces desktop and notebook computers, a software operating system, as well as in the digital music market with its iPod portable music players and iTunes online music store. Apple's businesses depend upon the ability to purchase competitively in the markets in which it competes.

Amicus The Black & Decker Corporation ("Black & Decker") is a global manufacturer and marketer of power tools and accessories, hardware and home improvement products. Black & Decker requires the freedom to purchase and price competitively to maintain its established worldwide business.

The decision below creates substantial uncertainty over one of the most common and procompetitive business practices—outbidding a competitor to purchase a product that both want. The court of appeals held that outbidding a rival could be deemed "predatory," and thus illegal, based on a

bare showing that a defendant with a large share of purchases in a local market paid "more than necessary" for the product in question. That determination is standardless, wrong, and presents an issue of great importance warranting Supreme Court review. The decision is contrary to applicable decisions of this Court, in particular the decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). By failing to adopt a principled and comprehensible rule governing the unilateral pricing decisions of purchasers under the Sherman Act, the court's decision threatens to chill legitimate and procompetitive purchasing activity throughout the country.[1]

SUMMARY OF ARGUMENT

1. This case severely clouds the application of the antitrust laws to a firm's unilateral pricing and purchasing decisions. The court of appeals held unambiguously that a jury is permitted to attach antitrust liability to a firm based on nothing more than proof of a large share of a local purchasing market coupled with evidence that the defendant paid "more than necessary" for the product in question. It is no exaggeration to say that the decision of the Ninth Circuit—which governs a large and important part of the national economy—will wreak havoc with the most basic purchasing decisions of businesses throughout the country. Review by this Court is a matter of national importance to ensure that purchasing decisions—of the sort that are made

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[1] In accordance with Supreme Court Rule 37.6, Amici state that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than Amici or their counsel, has made a monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief have been lodged with the Clerk of the Court.

thousands of times a day, every day—are evaluated under a correct legal standard.

The decision of the court of appeals affects not only market leaders but small firms as well. Under the decision below, firms with small shares of sales in output markets, but with large shares in smaller, local purchasing markets, may find themselves liable for treble damages if they succeed in outbidding their rivals to purchase local supplies. Indeed, those are the facts presented by this very case. A company with as small as a *three percent* market share in its output market has been found liable for almost $80 million in treble damages under the unworkable liability standard laid out in the opinion below.

The decision also represents part of a disturbing trend among several of the lower courts that permits the antitrust laws to interfere unduly with businesses' unilateral pricing decisions. In addition to the Ninth Circuit in this case, the decision of the Third Circuit in *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc), *cert. denied*, 124 S.Ct. 2932 (2004), applied an equally standardless analysis to bundled pricing practices—allowing, as in this case, triers of fact to substitute their judgment as to the appropriate measure of price competition without regard to whether the defendant's actions posed any threat to consumer welfare. The Court should use this opportunity to reaffirm its holding in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), the landmark antitrust case establishing the rules relating to unilateral pricing decisions, especially in those cases where, as here and in *Brooke Group*, the pricing decision involves a single product.

2. In its decision, the Ninth Circuit ignored the substantial body of precedent of this Court commanding that courts apply Section 2 in a manner that limits antitrust liability

to actions that harm consumer welfare. Instead, the court focused, improperly, on the welfare of petitioner's competitors. This Court held in *Brooke Group*, however, that a plaintiff can prevail on a predatory pricing claim only where the plaintiff demonstrates (1) that the defendant sacrificed profits by charging customers a price below an appropriate measure of cost, thereby threatening to drive competitors from the market, and (2) that once the competitive threat was weakened or removed, the defendant would be likely to recoup its losses by increasing prices to supracompetitive levels, thus harming consumer welfare. *Id.* at 224.

In *Brooke Group*, the Court adopted this bright-line rule for one primary reason: judging pricing decisions without clear safe harbors "is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting." *Id.* This same risk of falsely identifying pricing decisions as anticompetitive repeatedly has led the Court to exercise restraint in applying the antitrust laws to unilateral pricing activity. *See, e.g., Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The decision below, therefore, conflicts with the Court's decisions.

3. The failure of the court of appeals to apply the standard set out in *Brooke Group* to the facts of this case represents unsound antitrust policy. Because monopsonistic predatory overbuying functions, at worst, in the same manner as monopolistic predatory pricing, it makes no sense to evaluate buying claims under a harsher set of rules, as the court of appeals here has done. Using the same standard for predatory pricing both by buyers and sellers ensures consistency in both the courts and in markets, and adequately informs the business community as to the outer limits of

permissible competition. As it stands, the decision of the court of appeals introduces substantial uncertainty into the law, and threatens to chill legitimate and procompetitive pricing and purchasing behavior. If the Ninth Circuit's ruling is allowed to remain in force, firms will not have any guidance as to what purchasing competition is permissible and what is illegal, necessarily tempering and dulling the vigor of their purchasing conduct. Moreover, by failing to anchor its predatory overbuying Section 2 standard to a requirement to demonstrate recoupment, the court of appeals' decision provides no mechanism to demonstrate harm to consumer welfare.

4. The business community, consumers, and the lower courts need guidance on the application of Section 2 to predatory overbuying cases, and this case provides an ideal vehicle for providing such guidance. The court of appeals' decision plainly stated its opinion of the law, and it was limited to a clear and uncontested interpretation of the activity held to constitute exclusionary conduct. The Court is thus presented with a narrow and defined issue as to what legal principle should control: specifically, whether the rule in *Brooke Group* applies to predatory overbuying cases or whether a showing that the defendant paid "more than necessary" is enough. The issues here are neither novel nor difficult, but the need for clarification of the law is urgent, necessitating intervention of the Court. *Certiorari* should be granted accordingly.

ARGUMENT

I. THE NINTH CIRCUIT'S LIABILITY STANDARD—WHICH MAKES THE LEGALITY OF PURCHASING CONDUCT TURN ON WHETHER THE DEFENDANT PAID "MORE THAN NECESSARY"—IS BOTH WRONG AND UNINTELLIGIBLE, AND REPRESENTS A DISTURBING DEPARTURE FROM THIS COURT'S SECTION 2 JURISPRUDENCE.

A. This case involves an allegation of predatory buying in the market for "alder sawlogs" in the Pacific Northwest. *See Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030, 1034 (9th Cir. 2005). The parties, both sawmill operators in the Pacific Northwest region, competed until the plaintiff—respondent here—went out of business in 2001. *See id.* The plaintiff contended that the defendant--petitioner here—purchased more logs than it needed, or paid a higher price for such alder sawlogs than was necessary, with the intent to deprive plaintiff of the opportunity to acquire such logs. *See id.* at 1034-35. This activity, according to plaintiff, led it to exit the market. The district court instructed the jury that if it found that the defendant either "purchased more logs than it needed" or "paid higher prices than necessary," that finding by itself was sufficient to predicate liability against defendant under Section 2 of the Sherman Act. *Id.* at 1035. The Ninth Circuit affirmed.

In affirming the decision of the district court, the court of appeals set forth an impossibly vague and standardless explanation of the law, which threatens to disrupt the day-to-day purchasing decisions of businesses everywhere. Expressly rejecting the defendant's contention that this Court's decision in *Brooke Group* applied, the Ninth Circuit

concluded that it was unnecessary for an antitrust plaintiff to demonstrate anything more than that a defendant paid "more than necessary" for an input or purchased "too much of it." *Id.* Notwithstanding the very clear dictate of this Court to avoid an expansive and standardless application of Section 2, the court of appeals concluded that the district court "did not need to instruct the jury that overbidding for sawlogs could be anticompetitive conduct only if [the defendant] operated at a loss and a dangerous probability of [the defendant]'s recoupment of its losses existed." *Id.* at 1039.

The standard set forth by the court of appeals is unworkable. As then-Judge Breyer noted, it is impossible in antitrust cases to assign liability simply by instructing a trier of fact to "determine[e] what is a 'reasonable' or competitive' price." *See Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 927 (1st Cir. 1984). Yet that is precisely what the Ninth Circuit has done. A firm with a large share in a local buying market—even if that firm has but a tiny share of sales in a geographically larger selling market[2]—risks substantial antitrust liability under a standard with which the firm cannot possibly comply and still compete aggressively in the marketplace. It is precisely this type of subjective, unpredictable, and inconsistent standard that this Court has repeatedly sought to avoid with its careful and restrained interpretation of Section 2 to ensure that the antitrust laws do not act to undermine the "very essence of competition." *Matsushita Elec. Indus. Co.*, 475 U.S. at 594.

B. The Ninth Circuit decision also represents part of a disturbing trend among decisions of several of the lower

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[2] For instance, although the defendant in this case accounted for approximately 65% of alder sawlog purchases in the Pacific Northwest, the defendant's sales accounted for only about 3% of the nationwide hardwood floor sell-side market. Pet. 3-4 & n.2 (and record references there cited).

courts that have permitted triers of fact unduly to interfere with businesses' unilateral pricing decisions. The Supreme Court should grant *certiorari* to restore the application of its sensible *Brooke Group* rubric to apply to all challenges of a firm's unilateral pricing decisions (on both the buy-side and sell-side).

In addition to the Ninth Circuit decision in this case, the decision of the Third Circuit in *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003), *cert. denied*, 124 S.Ct. 2932 (2004) (rejecting *Brooke Group* in bundled discount situations), also allows triers of fact to condemn a firm's unilateral pricing decisions based upon nothing more than their own unguided judgment as to an appropriate measure of price competition, and without consideration of whether the defendant's decision to price compete might ultimately harm consumer welfare. As discussed above, however, the decision of the court of appeals here is even more problematic than the Third Circuit's *LePage's* decision, because in this case the court of appeals condemned a unilateral pricing decision involving *a single product*—precisely the conduct at question in *Brooke Group*. The decision below, particularly when coupled with *LePage's*, sets forth a dangerous new standard for Section 2 liability that threatens competition in a wide range of industries by punishing precisely the type of conduct the antitrust laws are designed to protect. *Certiorari* is warranted to reverse this trend and reaffirm that the basic principles underlying the decision in *Brooke Group* must apply where there is a challenge to a firm's unilateral pricing decisions.

The decision below and *LePage's* demonstrate that, absent intervention by this Court, the court of appeals may veer into the most serious errors of law and policy through what appears to be a fundamental misunderstanding of what the antitrust laws prohibit. The Sherman Act does not punish pricing conduct merely because it has the effect of harming a

rival. *See Atlantic Richfield Co.*, 495 U.S. at 328. Price competition benefits consumers, and without a demonstration that the defendant's pricing involves a short-term profit sacrifice designed to harm customers in the long term, condemnation of price competition represents a decision to punish "the lower cost structure of the alleged predator, [which] represents competition on the merits . . . beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting." *Brooke Group*, 509 U.S. at 223.

II. IN THE ABSENCE OF A CLEAR DEMONSTRATION OF HARM TO CONSUMER WELFARE, THIS COURT HAS REFUSED TO PENALIZE UNILATERAL PRICING CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT.

A. The court of appeals' decision in this case addressed the application of Section 2 of the Sherman Act to the so-called business practice of "predatory overbuying." *See, e.g.*, Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669 (2004). The court of appeals incorrectly held that this Court's decision in *Brooke Group* does not apply where a plaintiff alleges predatory overbuying in violation of Section 2. Specifically, the court of appeals concluded that "the [trial] court did not instruct the jury that overbidding for sawlogs could be anticompetitive conduct only if Weyerhaeuser operated at a loss and a dangerous probability of Weyerhaeuser's recoupment of its losses existed." *See Weyerhaeuser*, 411 F.3d at 1036. The decision to ignore *Brooke Group* is not only fundamentally flawed; there is a significant danger that it will chill the legitimate business activities of *amici* as well as the business community at large.

As this Court repeatedly has held, although some forms of conduct are unambiguously anticompetitive, it is often "difficult to distinguish robust competition from conduct with long-run anti-competitive effects." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984). Such "[m]istaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 414 (2004) (citation omitted).

In light of the danger that overbroad and vague applications of Section 2 can stifle legitimate competition, this Court has cautioned lower courts to interpret Section 2 carefully, and has provided clear guidance for doing so. *See, e.g., id.*; *see also United States v. Grinnell Corp.*, 384 U.S. 563 (1966). The Court has urged particular caution where the alleged violation of Section 2 involves a defendant's pricing decisions. *See, e.g., Brooke Group*, 509 U.S. at 223-24; *Atlantic Richfield Co.*, 495 U.S. at 328; *Cargill*, 479 U.S. at 104; *Matsushita Elec. Indus. Co.*, 475 U.S. at 594. Because pricing activity is the *sine qua non* of competition, it is often difficult to determine when a particular pricing decision is procompetitive or anticompetitive. To avoid identifying procompetitive pricing decisions incorrectly as violations of Section 2, this Court has commanded courts to limit the application of Section 2 to those instances in which clear, objective and unambiguous evidence shows that the defendant's pricing decisions were designed to be anticompetitive and in fact had the effect of harming long-term consumer welfare.

The Court's decisions also have recognized that the purpose of Section 2 is to protect competition, not smaller and sometimes inefficient competitors. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) ("The

antitrust laws . . . were enacted for 'the protection of competition, not competitors.'"). Unless a plaintiff demonstrates that the alleged anticompetitive act harmed or is likely to harm consumers, the plaintiff's claim fails. *See Atlantic Richfield Co.*, 495 U.S. at 330. Thus, predatory pricing is not condemned because it exacts a toll on other competitors. Instead, "[i]t is condemned because, if successful, it will eventually result in reduced output and higher prices." Herbert Hovenkamp, FEDERAL ANTITRUST POLICY 299 (1994).

In its decision below, the Ninth Circuit ignored this Court's repeated admonitions to confine the application of Section 2 to those instances where the conduct clearly threatens harm to consumer welfare. The decision allows a trier of fact to attach liability if it determines only that a purchaser paid or purchased more "than necessary" for an input—whatever that means. By failing to provide any operational guidance to a trier of fact, the Ninth Circuit's decision allows a jury to condemn pricing and purchasing judgments made by companies entirely without regard to the effect, if any, on competition.

B. The Court has consistently crafted antitrust rules under Section 2 that minimize interference with the unilateral pricing decisions of firms in the marketplace. *See, e.g., Matsushita Elec. Indus. Co.*, 475 U.S. at 594 (holding that because "cutting prices in order to increase business often is the very essence of competition," mistaken inferences that price cuts are anti-competitive "are especially costly, because they chill the very conduct the antitrust laws are designed to protect.").

As a result of this concern, in *Brooke Group*, the Court established a clear standard for predatory pricing claims. At the most general level, the Court defined predatory pricing as

an "unfair" price, designed "to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market." *Brooke Group*, 509 U.S. at 222. Specifically, the Court held that a successful predatory pricing claim requires two elements: "First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." *Id.* "The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices." *Id.* at 224.

In *Brooke Group*, the Court recognized that, as a theoretical matter, above-cost price reductions might result in injury to competition. *Id.* at 223. The Court nonetheless refused to impose antitrust liability in such situations because doing so would "court[] intolerable risks of chilling legitimate price-cutting." *Id.* The Court stated that imposing liability on a producer that was not engaged in predatory pricing is "especially costly" to competition because doing so "'chill[s] the very conduct the antitrust laws are designed to protect.'" *Id.* at 226 (quoting *Cargill, Inc.*, 479 U.S. 104); *see also Matsushita Elec. Indus. Co.*, 475 U.S. at 594. The *Brooke Group* Court's two-part test established a rule that condemns pricing behavior only where the conduct creates a substantial likelihood of true competitive injury to the market—while avoiding any chilling effect on legitimate, procompetitive pricing activity.

The decision below jettisons the reasoning and the policies underlying the Court's decision in *Brooke Group*. Supreme Court review is therefore warranted.

III. THE STANDARD ARTICULATED IN *BROOKE GROUP* SHOULD APPLY TO ALLEGATIONS OF PREDATORY OVERBUYING.

A. The Ninth Circuit's decision is especially disturbing to *amici* and other similarly situated businesses because it will ensnare firms with a large share in a local buying market even if that firm has but a tiny share of sales in a geographically larger selling market. The overbroad standard set forth in the court of appeals' decision punishes firms who compete aggressively on price in the input market just to remain competitive in the output market, as the facts of this very case demonstrate.

An understanding of how monopsony power is achieved, and how it harms customers, is important to an understanding of the issues underlying this case. The Ninth Circuit concluded below that predatory overbuying was different from predatory pricing and, as a result, concluded that the *Brooke Group* test was not applicable to predatory overbuying claims. *See Weyerhaeuser*, 411 F.3d at 1039. The Ninth Circuit's decision was fundamentally flawed because it failed to recognize that, to the extent that predatory buying claims differ at all from predatory selling claims, those differences counsel application of rules that are *more* deferential to the defendant's pricing decisions and are more, not less, clear for businesses to understand.

Just as monopoly power is the power to restrict output (production) and thereby increase selling prices, monopsony power is the power to restrict output (purchases) and thereby decrease buying prices. *See* Dennis W. Carlton & Jeffrey M. Perloff, MODERN INDUSTRIAL ORGANIZATION 108 (4th ed. 2005). By decreasing its own demand, the monopsonist decreases overall demand in the input market. When demand for the input is reduced, the sellers of the input will have

excess supply of that input, forcing them to lower the price of the input to a level at which the monopsonist is willing to purchase it. Consumers are harmed, not by the lower prices as such, but because, when the monopsonist decreases its purchases, market output of the input product is reduced and allocative efficiency is impaired.

Buyer-side market concentration generally, and monopsony power in particular, are much less prevalent in our national economy than seller-side concentration (and power). *See* 4A Phillip Areeda, Herbert Hovenkamp & John Solow, ANTITRUST LAW ¶ 981 (1998). Given that fact, there can be no empirical or theoretical basis for treating buyer-side conduct more harshly than sell-side behavior. If anything, the opposite is true.

The circumstances under which a large buyer has both the power and the *incentive* to reduce market supply and thereby harm consumers are particularly rare. The monopsonist typically will have little incentive to reduce market supply of the input product (or otherwise render the buying side of the market less competitive) because a less competitive input market will impair the company's ability to compete downstream on the selling side. Consumer harm is plausible, therefore, only where a firm has true monopsony power—the power to reduce buying prices by reducing purchases and thus output marketwide—*and* the incentive to exercise that power to the detriment of consumers. *See generally* Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669 (2004). There is no evidence that those essential conditions are prevalent in our economy.

Hypothetically, a firm can attempt to gain monopsony power through predatory overbuying, much in the same manner that a firm can attempt to gain monopoly power through predatory pricing. Predatory overbuying occurs

when a buyer bids up the market price of a critical input to such a high level that rival buyers cannot compete. The buyer gains market power in the input market as rival buyers are forced to exit the market because they are unable to purchase the input and remain profitable as prices for the input continue to rise. *See id.* at 675.

During the predatory overbuying period, in which the firm overbuys an input, consumers will benefit if the firm uses that increased input purchase to produce additional output, leading to a decrease in the price of the output product. That consequence is likely—and particularly beneficial to consumers—where, as here, the accused firm may have a large share of purchases in the local purchasing market but a lower share, and no market power, in the selling side of the market.[3] Suppliers of the input benefit as well—with increased demand and increased prices for their inputs, suppliers have every incentive to increase their supply and additional potential suppliers likely will be encouraged to enter the market in order to reap the extra benefit of the so-called predatory buying scheme. *See id.* at 675-76, 677.

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[3] In this regard, unsuccessful predatory overbuying benefits consumers just like predatory pricing, and can have salutary effects on consumer welfare. Overbuying enables companies (1) to keep reserves to hedge against risk (*e.g.*, oil in times of crises); (2) establish loyal customer relationships; and (3) increase scale economies and/or invest in growth. Thus, such overbuying actually encourages procompetitive behavior in the market, much like exclusive dealing arrangements encourage such behavior. *See, e.g., Standard Oil Co. v. United States (Standard Stations)*, 337 U.S. 293, 306-07 (1949). The potential for this behavior to actually benefit consumer welfare is yet another reason why the Court in *Brooke Group* refused to assign liability to predatory pricing schemes without demonstrating clear harm to consumer welfare. *See Brooke Group*, 509 U.S. at 226.

It is only in the period after input purchase rivals exit the market that a firm with monopsony power can harm consumer welfare. If rivals exit, and there is only one or a few suppliers left in the market for an input *and* the market structure is such that new input purchasers will not enter, the monopsonist may then reduce its demand for the input, driving prices for the input lower, and decreasing output—harming consumers through higher prices in the output market if the defendant has market power in that market as well. Predatory overbuying, therefore, harms consumers and competition only under a narrow and specific set of circumstances. *See id.* at 676-79.

Although it is hypothetically possible for predatory overbuying to be successful in the absence of some profit sacrifice (*i.e.*, where marginal cost of the purchases does not exceed the marginal revenue anticipated to result from the defendant's sales), such a result appears extraordinarily remote. Interestingly, prior to 2003, no in-depth study of predatory overbuying had been conducted—suggesting that academics did not consider it to be a significant business strategy—and only *three* court cases alleged that such conduct violated the antitrust laws (and note, that all three were *competitor*, rather than *customer*, lawsuits). *See* John B. Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 ANTITRUST L.J. 625, 656-57 (2004).

This is not surprising. One would expect far fewer predatory overbuying cases alleging successful monopsonization because it is far less likely to occur than even monopolization through predatory pricing. As mentioned above, in most markets, buyers are less concentrated than sellers. Moreover, because inputs are purchased by firms competing in a broad range of output markets, monopsony is possible only when resources are specialized to just a few uses. *See* Dennis W. Carlton &

Jeffrey M. Perloff, MODERN INDUSTRIAL ORGANIZATION 117 (1989). As a result, with relatively few markets sufficiently concentrated actually to permit monopsony practices, courts should be particularly circumspect in punishing behavior that in the end is unlikely to cause monopsony conditions and harm consumer welfare. The danger of falsely identifying anticompetitive behavior—and deterring procompetitive conduct—is very high relative to the tiny universe of instances where the conduct actually could be harmful. That monopsonistic predatory overbuying is not common does not mean that the decision of the Ninth Circuit will not have profound consequences on the purchasing behaviors of companies nationwide. In fact, by sanctioning such a standardless and subjective framework by which to judge allegations of predatory overbuying, the decision threatens to chill the legitimate and procompetitive purchasing conduct of *amici* and similarly situated businesses for fear that they will unintentionally run afoul of the murky dictates in the court of appeals' decision.

Because monopsonistic predatory overbuying functions in the same manner as does monopolistic predatory pricing, is considerably more rare, and is not in any way *more* harmful to consumers, it should not be judged any more harshly that predatory selling. Applying the same standard—the *Brooke Group* standard—achieves the appropriate balance. A uniform standard ensures consistency in the courts and markets, and adequately informs the business community as to the outer limits of permissible competition.

B. Applying the *Brooke Group* standard to buyer cases is straightforward. Under *Brooke Group*, predatory buying may be condemned if, and only if, the plaintiff demonstrates that the defendant's incremental costs in making the purchases exceed its reasonably anticipated incremental revenues *and* there is a dangerous probability that the defendant will recoup

those losses and gain supracompetitive profits once the competition has been weakened or removed. *See* Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669, 672 (2004). Calibrating Section 2 to condemn predatory overbuying only where the defendant business is objectively sacrificing profits by purchasing inputs at a level that results in a reduction in the firm's reasonably anticipated incremental revenue minimizes the risk of punishing false positives. In addition, such a standard stays true to the Court's observation in *Brooke Group* that making subjective determinations as to whether a particular purchase is predatory "is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting." *Brooke Group*, 509 U.S. at 223. Employing any other standard that would attach liability where a purchaser was not foregoing profits by purchasing inputs would require a jury to determine whether a business was paying too much for an input.

Allowing courts to determine which profitable purchases to allow and which to condemn is simply not within the realm of judicial competence. *See id.* at 222. Thus, to avoid punishing such "false positives," the Court has mandated the application of an objective, cost-based test to judge such pricing behavior. Anything short of that would make the application of Section 2 unmanageable.

IV. THE NINTH CIRCUIT'S ERRONEOUS RULING WILL HARM *AMICI* AND THE BUSINESS COMMUNITY AS A WHOLE BY DEPRIVING THEM OF CERTAINTY REGARDING THEIR UNILATERAL PURCHASING DECISIONS.

This Court has recognized that it is a fundamental precept of antitrust enforcement that courts should never "act as central planners, identifying the proper price, quantity, and

other terms of dealing" between private actors because triers of fact "are ill-equipped" to make such tenuous business judgments. *See Trinko*, 540 U.S. at 408. The court of appeals decision, however, requires triers of fact to do precisely that, by providing no clear rule by which to judge whether overbuying violates Section 2.

The uncertainty created by this case cannot be overstated. A firm may outbid its rivals for inputs, even to the point of "overpaying," for many reasons other than the desire to control a resource market unlawfully. For example, a firm may choose to pay "more than necessary" simply to ensure that the company secures access to needed or desired inputs. Companies may also want to build up an inventory of supplies based on their assessments or predictions of conditions, like bad weather, that may limit supplies in the future. Companies also may be forced to bid "more than necessary" because they have imperfect information about the price they must bid in order to secure supplies. In fact, it is not infrequently the case that suppliers will misrepresent the amount that purchasers must pay. *See generally Great Atlantic & Pacific Tea Co., Inc. v. FTC*, 440 U.S. 69 (1979). Under the court decision below, in any one of those circumstances, *amici* or other businesses could be found liable for predatory overbidding if they were later found to have bid "more than necessary."

The decision below creates an untenable situation for producers that wish to engage in price competition on the buy side, yet at the same time wish to avoid being sued under the antitrust laws for buy-side predatory behavior. If companies like *amici* are found to have market power in a relevant purchasing market, they can no longer rely on *Brooke Group*'s bright-line rule to protect them from predatory buy-side pricing suits directed at conduct that threatens no consumer harm. The Ninth Circuit's rule places *amici* and

other producers in a position that undoubtedly will chill competition by making producers increasingly reluctant to engage in competitive activity with regard to their purchasing decisions for fear that some trier of fact will determine that they bought too much or paid too much for a critical input.

That *amici* can no longer rely upon *Brooke Group* when purchasing inputs is disquieting. *Amici* depend on the ability to compete aggressively to maintain acceptable levels of profitability and market share—the hallmark of our economy. Applying a less rigorous standard (or, as here, what amounts to no standard at all) to the buyer-side equivalent of predatory pricing exposes *amici* to both an unacceptable level of uncertainty in the market and potentially enormous antitrust liability (in the form of treble damages) for activity that, in most instances, will be procompetitive and, even if harmful to rivals, rarely could be successful in damaging consumer welfare.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* to the Court of Appeals for the Ninth Circuit should be granted. The Court may also wish to consider whether summary reversal would be appropriate given the clarity of conflict with this Court's decisions.

Respectfully Submitted,

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